

REMARKS

Claim 1 stands rejected under 35 U.S.C. §102(b) for asserted anticipation by European Union Plant Breeders' Rights Application No. 19981665, published August 16, 1999 in the Official Gazette of the CPVO, combined with the first public availability of 'Penlava' in Germany on March 1, 1999.

These references are non-enabling publications and do not indicate public use or sale of 'Penlava' in the United States more than one year before the filing of the instant application. The attached CPVO publication is not enabling and does not teach use of the new variety in the United States more than one year before the filing date of the instant application.

Furthermore, according to the recent decision by the Court of Appeals for the Federal Circuit, "the foreign sale must not be an obscure, solitary occurrence that would go unnoticed by those skilled in the art. Its availability must have been known in the art, just as a printed publication must be publicly available." *In re Elsner*, 2004 U.S. App. LEXIS 16708, *17 (Fed.Cir. 2004). The Court then remanded the case for "further factual findings relating to the accessibility of the foreign sales of the claimed plants and the reproducibility of the claimed plants from the plants that were sold." *Id.* at *18. No information regarding the accessibility of the foreign sales of the claimed 'Penlava' plants and the reproducibility of the claimed 'Penlava' plants from the plants that were sold is presently of record.

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Withdrawal of the rejection under 35 U.S.C. §102(b) is respectfully requested.

Respectfully submitted,

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